No. 03-967

In The
Supreme Court of the United States

MANJIT S. KANG,

Petitioner,

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY and the DEPARTMENT OF AGRONOMY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
A. This "Conflict" Lacks Importance	2
B. The Ruling Below Does Not Conflict With Any Decision Of This Court	9
C. What Should The Rule Be?	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Banks v. East Baton Rouge Parish School Board, 320 F.3d 570 (5th Cir.), *cert. denied*, 124 S. Ct. 82 (2003) 8

Bell v. City of Dallas, 72 Fed. Appx. 82 (5th Cir. 2003), *cert. denied*, 2004 WL 46768 (2004) 8

Bickel v. Burkhart, 632 F.2d 1251 (5th Cir. 1980) 4

Brady v. Thurston Motor Lines, 726 F.2d 136 (4th Cir.), *cert. denied*, 469 U.S. 827 (1984) 4

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998) 12

Connell v. Bank of Boston, 924 F.2d 1169 (1st Cir. 1991) 5

Dale v. Chicago Tribune Co., 797 F.2d 458 (7th Cir. 1986) 14

DeAngelis v. El Paso Mun. Police Officers Assn., 51 F.3d 591 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 473 (1995) 8

East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975), *reversed on other grounds, Burdine v. Texas Dept. of Community Affairs*, 647 F.2d 513 (5th Cir. 1981) 4

EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) 4

EEOC v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993) 4

Elrod v. Sears, Roebuck & Co., 939 F.2d 1466 (11th Cir. 1991) 14

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) ... 4, 11

TABLE OF AUTHORITIES – Continued

Page

Fierros v. Texas Department of Health, 274 F.3d 187 (5th Cir. 2001) 7

Fortenberry v. Texas, 75 Fed. Appx. 924 (5th Cir.), *cert. denied*, 2004 WL 76760 (2004) 8

Gunnell v. Utah Valley State College, 152 F.3d 1253 (10th Cir. 1998) 4

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 11

Hernandez v. Crawford Building Material Co., 321 F.3d 528 (5th Cir.), *cert. denied*, 124 S. Ct. 82 (2003) 8

Hill v. Mississippi State Employment Service, 918 F.2d 1233 (5th Cir. 1990), *cert. denied*, 502 U.S. 864 (1991) 8

Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985) 4

Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995) 14

Jeffries v. Kansas, 147 F.3d 1220 (10th Cir. 1998) 4

Kang v. Louisiana, No. 00-705, 531 U.S. 1126 (2001) 1, 8

Kephart v. Institute of Gas Tech., 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) 14

Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992), *affirmed*, 511 U.S. 244 (1994) 8

Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 336 (1997) 3, 4, 7

Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359 (7th Cir. 1988) 14

TABLE OF AUTHORITIES – Continued

Page

Messer v. Memo, 130 F.3d 130 (5th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999) 8

Nidds v. Schindler Elevator Corp., 113 F.3d 912 (9th Cir. 1996) 5

Page v. Bolger, 645 F.2d 227 (4th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 892 (1981) 10

Parcinski v. Outlet Co., 673 F.2d 34 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) 14

Pollard v. Rea Magnet Wire Co., 824 F.2d 557 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987) 14

Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000) 5

Robinson v. City of Pittsburgh, 120 F.3d 1286 (3rd Cir. 1997) 8

Robinson v. Shell Oil Company, 519 U.S. 337 (1997) 9, 12

Ross v. Communications Satellite Corporation, 759 F.2d 355 (4th Cir. 1985) 3

Smart v. Ball State University, 89 F.3d 437 (7th Cir. 1996) 8, 14

Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir.) 5

Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (9th Cir. 1996) 5

Torres v. Pisano, 116 F.3d 625 (2nd Cir. 1997) 5

Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001) 4, 6

Waddell v. Small Tube Products, Inc., 799 F.2d 69 (3rd Cir. 1986) 4

TABLE OF AUTHORITIES – Continued

Page

Wanamaker v. Columbian Rope Company, 108 F.3d 462 (2nd Cir. 1997) 6

Welsh v. Derwinski, 14 F.3d 85 (1st Cir. 1994) 5

West v. Marion Merrell Dow Inc., 54 F.3d 493 (8th Cir. 1995) 4

Whitaker v. Carney, 778 F.2d 216 (5th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986) 8

Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453 (11th Cir. 1998) 4

Williams v. Bristol-Myers Squibb Co., 85 F.3d 270 (7th Cir. 1996) 14

Wu v. Thomas, 996 F.2d 271 (11th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994) 13

STATUTES

42 U.S.C. § 2000e-2 ..... 2, 3

42 U.S.C. § 2000e-3 3

STATEMENT OF THE CASE

Petitioner herein has accurately summarized the procedural history of this case. Likewise, he has correctly pointed out that this Court has jurisdiction in this matter. He has also fairly stated the issue on which the parties herein disagree. His summary of the information which this Court needs to know about this litigation is adequate. He glossed over the fact that he previously sought a writ of certiorari from this Court on this very same issue and that his request was denied. See *Kang v. Louisiana,* No. 00-705, 531 U.S. 1126 (2001). Additionally and understandably, Professor Kang did not emphasize the fact that he failed to prove that he was the victim of any discrimination. Although that is not fatal to a claim of retaliation, it certainly undercuts it.

The only information the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU")[1] would add is that those who stand accused of retaliating against Professor Kang vehemently deny having done so. LSU's decision to attempt to dispose of this matter on procedural grounds was made solely on economic grounds and not out of fear that petitioner will be able to prove the accuracy of *any* of his allegations.

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[1] It should be noted that LSU is the only defendant in this case. The LSU Department of Agronomy is not a legal entity.

SUMMARY OF ARGUMENT

Petitioner suggests that the Fifth Circuit has misinterpreted the Civil Rights Act of 1964 by too narrowly reading the term "adverse employment action" so as to require that a person show that he was subjected to an "ultimate" employment decision in order to have a claim for retaliation. He further contends that the Fifth Circuit's standard on this point is in conflict with that used by eight of the other circuits. LSU respectfully submits that petitioner's application for certiorari should be denied because the "conflict" between the circuits which he relies upon does not rise to the level of importance required for this Court to resolve it since it appears that all of the lower courts are, essentially, reaching the same result, though by different means. This Court has previously declined to resolve this "conflict," both at the invitation of petitioner herein and by others, and LSU respectfully submits that there is no reason for this Court to do so now.

ARGUMENT

MAY IT PLEASE THE COURT:

A. This "Conflict" Lacks Importance

It is well understood that Congress passed the Civil Rights Act of 1964 in order to reduce discrimination in employment based on various factors. Specifically, Section 703 of Title VII, 42 U.S.C. § 2000e(2) prohibits discrimination with respect to the "compensation, terms, conditions and privileges of employment" as well as those acts which tend to "deprive an employee of opportunities" or "adversely affect his status." Congress also sought to protect those who assert a claim for discrimination from being

subjected to retaliation for doing so. Section 704 of Title VII, 42 U.S.C. § 2000e(3), provides, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Although Section 2000e(3) does not use the phrase "adverse employment actions," the courts have long held that Congress did not intend to provide a higher level of protection for retaliation (in Section 2000e(3)) than it provided for discrimination (under Section 2000e(2)). See *Ross v. Communications Satellite Corporation*, 759 F.2d 355, 365 (4th Cir. 1985) *abrogated on other grounds by Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989); and *Mattern v. Eastman Kodak Company*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932, 118 S. Ct. 336, 139 L.Ed.2d 336 (1997). Thus, it has been uniformly held that retaliation claims require proof of an "adverse employment action." Accordingly, whether discrimination or retaliation is involved, the conduct must rise to the level of an "adverse employment action" in order to be prohibited. Stated another way, Congress did not outlaw all discrimination and retaliation; only those acts which constitute an adverse employment action.

So, what constitutes an adverse employment action? Not surprisingly, not every court has used the same language in order to answer that question. However, the courts have done a remarkable job of answering that question in the same way. There is complete agreement

among the circuits that "ultimate employment decisions," such as those involving hiring,[2] granting leave, discharging,[3] promoting[4] or compensating[5] fall within the scope of the Civil Rights Act. *Von Gunten v. Maryland,* 243 F.3d 858 (4th Cir. 2001) and *Mattern v. Eastman Kodak Company, supra.* Similarly, at the other end of the spectrum, the courts have agreed that the Civil Rights Act is "neither a 'general civility code' nor does it make actionable the 'ordinary tribulations' of the workplace." *Gunnell v. Utah Valley State College,* 152 F.3d 1253, 1265 (10th Cir. 1998) (quoting *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998).) That is, "there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause." *Wideman v. Wal-Mart Stores, Inc.,* 141 F.3d 1453, 1456 (11th Cir. 1998). See also *Jeffries v. Kansas,* 147 F.3d 1220, 123-33 (10th Cir. 1998) ("tense personal relationships do not rise

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[2] This includes the refusal to rehire an employee as well as the withdrawal of a reinstatement offer. See *East v. Romine, Inc.*, 518 F.2d 332, 340 (5th Cir. 1975), *reversed on other grounds, Burdine v. Texas Dept. of Community Affairs,* 647 F.2d 513 (5th Cir. 1981) and *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69, 73-4 (3rd Cir. 1986); and *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993).

[3] See also *Brady v. Thurston Motor Lines*, 726 F.2d 136, 141 (4th Cir.), *cert. denied*, 469 U.S. 827 (1984). Even constructive discharges fall within the protection of the Civil Rights Act. See *West v. Marion Merrell Dow Inc.*, 54 F.3d 493, 497 (8th Cir. 1995) and *Holsey v. Armour & Co.* 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985).

[4] See also *Brady v. Thurston Motor Lines,* 726 F.2d 136, 141-2 (4th Cir.), *cert. denied,* 469 U.S. 827 (1984) and *Bickel v. Burkhart,* 632 F.2d 1251, 1255-06 (5th Cir. 1980).

[5] Protection of compensation even extends to the denial of severance pay. See *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1089-90 (5th Cir. 1987) (construing parallel provision under the ADEA).

to the level of actionable retaliation"); *Torres v. Pisano,* 116 F.3d 625, 640 (2nd Cir. 1997) (feeling "frightened" and "intimidated" is insufficient without a "materially adverse change in the terms and conditions of employment"); *Welsh v. Derwinski,* 14 F.3d 85, 86 (1st Cir. 1994) ("not every unpleasant matter short of [discharge or demotion] creates a cause of action" for retaliation); *Connell v. Bank of Boston,* 924 F.2d 1169, 1179-80 (1st Cir. 1991); *Cf. Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).[6]

Thus, the only area where there is some disagreement involves those situations in between those two extremes. Even in this "middle" ground, there is considerable agreement between the courts as to what is and what is not prohibited retaliation such that the "conflict" between the circuits is so small that it does not present an *important* conflict within the meaning of Rule 10 of the Rules of the

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[6] Even though the Ninth Circuit has suggested that, from an analytical standpoint, it makes more sense to conclude that all discrimination and retaliation is prohibited and that actions which are inconsequential should be resolved as a matter of damages rather than liability, in practice, it reaches the same result as other circuits. By focusing on whether the conduct in question is reasonably likely to deter employee's from engaging in protected activity, virtually the same conduct which other circuits find does not rise to the level of adverse employment actions is held, by the Ninth Circuit, to be insufficient to support a cause of action because it does not reasonably deter employees from engaging in protected activity. *Ray v. Henderson, supra,* 217 F.3d at 1243. See also *Strother v. Southern California Permanente Medical Group,* 79 F.3d 859, 869 (9th Cir. 1996) (mere ostracism by co-workers does not constitute actionable retaliation), *Steiner v. Showboat Operating Co.,* 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082, 115 S. Ct. 733, 130 L.Ed.2d 636 (1995) (lateral transfer was "just barely – if at all – characterizable as an adverse employment action.") and *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912 (9th Cir. 1996) (transfer was not considered to be an adverse employment action).

Supreme Court. That is, most cases are resolved in the same way. The Fourth Circuit has specifically recognized this result and stated that "[s]ometimes the practical differences between these two standards are difficult to discern." *Von Gunten v. Maryland*, 243 F.3d 858, 864 (4th Cir. 2001). That court also noted that only if the "ultimate employment decision" standard is "strictly applied" does it make any difference in practice. 243 F.3d at 864.

In fact, the greatest difference between the Fifth Circuit's "ultimate employment decision" standard and the "alters the terms, conditions or benefits of employment" standard employed by some other courts is that the Fifth Circuit has attempted to create a "bright-line" test whereas other circuits are relying on the more traditional *stare decisis* method of answering this question on a case-by-case basis.[7] The important point is that, whether the "rule" is announced in advance, as the Fifth Circuit has attempted to do, or the boundaries are located by way of experientially bracketing what is "in" and what is "out," as some other courts have done, the outcome is essentially the same.

Indeed, contrary to what the Fifth Circuit said in *Mattern, supra,* that it was trying to do (i.e., adopt a bright-line rule which would provide more guidance), what that Court really did in the instant case was conduct a very case-specific analysis of petitioner's claim. The court then proceeded to look at the facts of this case and, based

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[7] See also *Wanamaker v. Columbian Rope Company,* 108 F.3d 462 (2nd Cir. 1997) ("Because there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of "adverse.").

on those facts, concluded that Professor Kang had not suffered an adverse employment action because he "did receive a pay raise and that his raise was both substantial and larger than that received by some of his colleagues." Petitioner's Appendix, page 4a.

Stated another way, the Fifth Circuit has not held – as petitioner would have this Court believe – that, under no circumstances, can an inappropriately small pay raise constitute retaliation. In fact, just the opposite is true. In *Mattern, supra,* the Fifth Circuit specifically included compensation issues within the scope of what it called "ultimate employment actions." Thereafter, in *Fierros v. Texas Department of Health*, 274 F.3d 187, 193 (5th Cir. 2001), the Fifth Circuit held that the denial of a pay increase and similar actions constitute "ultimate employment actions." And, in reaching its decision to dismiss petitioner's lawsuit in this case, the Fifth Circuit did not retreat from its prior position. Instead, as noted above, that court only concluded that, based on the specific facts of this case, Professor Kang's pay raise was not so small that it should be considered retaliatory. Any doubt about whether, in the Fifth Circuit, the denial of a pay raise can be considered to be retaliation is completely destroyed by the Fifth Circuit's acknowledgment in this case that it has "never explained precisely when denials of pay raises constitute ultimate employment decisions." Petitioner's Appendix, page 5a.

The conclusion that this "conflict" is minor in nature is also supported by the fact that the conflict was known at the time when the Fifth Circuit announced its position and this Court denied writs in that very case. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 336 (1997). Moreover, this Court has

declined to take up numerous other cases where actions less than "ultimate employment decisions" were found to be outside of the scope of protection of the Civil Rights Act of 1964.[8] In fact, this Court previously decided not to resolve this "conflict" when asked to do so by the petitioner in this case in one of his predecessor lawsuits against LSU. See *Kang v. Louisiana,* No. 00-705, 531 U.S. 1126 (2001).

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[8] See, e.g., *Bell v. City of Dallas*, 72 Fed. Appx. 82 (5th Cir. 2003), *cert. denied*, 2004 WL 46768 (2004); *Fortenberry v. Texas*, 75 Fed. Appx. 924 (5th Cir.), *cert. denied*, 2004 WL 76760 (2004); *Hernandez v. Crawford Building Material Co.*, 321 F.3d 528 (5th Cir.), *cert. denied*, 124 S. Ct. 82 (2003); *Banks v. East Baton Rouge Parish School Board*, 320 F.3d 570 (5th Cir.), *cert. denied*, 124 S. Ct. 82 (2003); *Messer v. Memo*, 130 F.3d 130 (5th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Hill v. Mississippi State Employment Service*, 918 F.2d 1233 (5th Cir. 1990), *cert. denied*, 502 U.S. 864 (1991) (retaliation claim rejected because based only upon allegations that co-workers stared at plaintiff, followed her, prolonged the time she had to wait for disbursement checks, relegated her file to a less desirable classification, deleted evidence of work experience from a reference form and criticized her for filing an EEO charge); *DeAngelis v. El Paso Mun. Police Officers Assn.*, 51 F.3d 591 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 473 (1995) (jury verdict overturned where employee's complaint of retaliation was based solely on derogatory comments by fellow employees); *Whitaker v. Carney*, 778 F.2d 216, 221 (5th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986) (Title VII held not to protect an employee from harassment outside the workplace by non-employees); *Landgraf v. USI Film Products*, 968 F.2d 427, 431 (5th Cir. 1992), *affirmed*, 511 U.S. 244 (1994) (refusal of co-employees to speak to plaintiff held not to constitute retaliation). See also *Robinson v. City of Pittsburgh,* 120 F.3d 1286 (3rd Cir. 1997) ("anger, irritation, dirty looks, even the silent treatment, can cause distress" but do not rise to the level of an adverse employment action) and *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996) (receipt of a negative performance review does not constitute retaliation).

Petitioner has done a masterful job of creating the appearance that this "conflict" is one of great importance. In fact, reading his petition makes it sound like most circuits have concluded that *all* acts of retaliation are prohibited whereas the Fifth Circuit has limited the scope of protection to those few acts of retaliation which constitute "ultimate" employment decisions. That is simply not the case, however.

B. The Ruling Below Does Not Conflict With Any Decision Of This Court

In his effort to get this Court to grant his writ application, petitioner argues that the Fifth Circuit's decision is "emphatically inconsistent" with this Court's decision in *Robinson v. Shell Oil Company*, 519 U.S. 337, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997). In that case, this Court concluded that Congress intended former employees (as well as current ones) to be protected from retaliation. This Court's decision in *Robinson* was based, in large part, on the fact that a primary purpose of Section 704(a) is to prevent retaliation. This Court employed the standard method of statutory construction of an ambiguous term and selected the interpretation which was most consistent with the purpose of the law.

Recognizing that one of the purposes of the anti-retaliation provisions of the Civil Rights Act is to prevent retaliation offers little help in this case however, because the choice or "conflict" between the circuits – if one even exists – is not between a method which does not protect

against retaliation and an approach which does.[9] As demonstrated above, the Fifth Circuit has not held that inappropriately small pay raises do not constitute retaliation. It merely held that, under the facts of this specific case, petitioner's substantial raise, which was larger than that received by some of his colleagues, did not support a claim of retaliation.

Petitioner's complaint is really that Congress did not choose to prohibit all possible manifestations of retaliation. Thus, he incorrectly suggests that it is "inconceivable that Congress intended to permit employers to ... [retaliate so as] to punish or deter utilization of the administrative and judicial enforcement mechanisms created by Title VII. (Petitioner's Brief, page 13.) In fact, however, that is precisely what Congress did by way of inserting the "adverse employment action" requirement. (And, if that result was unintended, Congress has had almost forty years to amend Section 704(a) in order to make it clear that it intended to outlaw all retaliation; not just that which rises to the level of an adverse employment action.)

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[9] Interestingly, the Fifth Circuit's approach to defining what is an adverse employment action would not prevent Charles Robinson from suing Shell Oil Company. The case involved an employee who, shortly after being fired by Shell, filed an EEOC charge. While that claim was pending, the employee applied for a job with another company, which contacted Shell for an employment reference. As a result of the reference given, the other company declined to hire the plaintiff. Blacklisting a former employee would be considered an ultimate employment action because it results in a decision not to hire that person. In fact, the Fourth Circuit, upon which the Fifth Circuit relied in reaching its position, reached that conclusion. See *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 892 (1981).

Why would Congress have chosen not to prohibit all retaliation? One good explanation is the difficulty which would be created in attempting to enforce such a law. As this Court has recognized in connection with attempting to delineate when a "hostile work environment" constitutes actionable discrimination, in order to be workable, there must be both *subjective* and *objective* evidence of offensive conduct. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). See also *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Placing some rude, petty and unprofessional actions outside the scope of the protection of the Civil Rights Act is nothing more than a concession to the difficulties which would be created by attempting to enforce such rules, especially since they are, in the first instance, a matter of perception. It would be a nearly impossible task to sort out what is and what is not acceptable behavior, especially since each encounter involves a highly subjective and infinitely variable set of possibilities.[10]

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[10] This point can be illustrated using some of petitioner's own allegations of retaliation. Professor Kang has complained that, after he filed a charge of discrimination (following the selection of another candidate to become the Chairman of the LSU Department of Agronomy), some of his colleagues avoided him and failed to speak to him. He also alleged that others "cleared their throats" when passing by his office. And, on one occasion, a co-employee followed him into the faculty parking lot and then looked at him in a "threatening" manner.

Is it enough to smile when a co-worker passes or should it be accompanied by a nod? Is shaking hands and a perfunctory "Good morning" sufficient or must it be followed by some chit-chat and an invitation to lunch? Do all co-workers, including those whose offices are on a different floor or in another building, have to stop by to say hello? Once a day or more frequently? Should traffic signals be installed to prevent two employees from exiting the building at the same time so that one will not need to fear that he is being followed? Must an

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Not only is the Fifth Circuit's approach consistent with the result reached in *Robinson v. Shell Oil Company, supra*, it is also consistent with another case recently decided by this Court. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998), this Court added definition to the phrase "tangible employment actions" in the context of sexual harassment claims, by holding that, where a tangible job detriment occurs, the employer will be liable for supervisory sexual harassment. The definition of "tangible employment action" in this context is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. 118 S. Ct. at page 2268. That is, of course, the same approach taken by the Fifth Circuit for retaliation claims and reflects the same preference for clarity and predictability.

C. What Should The Rule Be?

In the event that this Court determines that the time is now ripe to attempt to give the phrase "adverse employment action" a more precise meaning and, further,

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employer forbid employees from clearing their throats in certain areas of the office?

Of course, the problems would not end with personal interactions between co-workers. The possibilities are virtually endless. Must an employer forever and automatically accede, following the filing of a charge of discrimination, to every request by that employee, for additional supplies, equipment and personnel with which to do his work? Can the employer even question the request for additional resources or is that showing a lack of respect which is actionable as retaliation?

decides to reach the merits of this issue at the writ grant/denial stage as it is authorized to do under Rule 16 of the Rules of the Supreme Court (by simply identifying one of the approaches as the one to be utilized instead of hearing oral arguments and issuing a formal opinion), LSU respectfully submits that the analysis used by the Fifth Circuit should be adopted and imposed on all circuits. This is an area where all concerned benefit tremendously from knowing the answer in advance. Even though, as petitioner points out, an unscrupulous employer will know exactly how to "safely" retaliate, that is a small price to pay for the certainty which is achieved by a "bright-line" test instead of a pure case-by-case method of working out the rules.

It is well known that employers almost always want to know, in advance, precisely which actions are allowed and which are not. As the Eleventh Circuit pointed out:

> Although we have interpreted Title VII to mean that an employer cannot retaliate by taking an 'adverse employment action' against an employee . . . we have never defined what this general phrase means. [As a result,] a reasonable employer 'has no way of knowing' for certain whether acts short of firing, demoting, or refusing to hire an employee could violate Title VII['s anti-retaliation provision].

Wu v. Thomas, 996 F.2d 271, 274 (11th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994). Similarly, employees will also benefit by knowing, in advance, what costs they can be expected to have to bear if they file a claim of discrimination or otherwise engage in protected activity. Indeed, it is possible that the bright-line approach adopted by the Fifth Circuit benefits *employees* more than it does

employers because it destroys any misconception that a person might otherwise have about what can happen to him if he files a charge of discrimination. It is plainly unfair to have only a nebulous standard which does not alert someone in advance of the risks they are about to take.

And, finally, the courts will clearly benefit from a bright-line standard which eliminates the need for a time-consuming, painstakingly-slow, case-by-case analysis of the facts in each case of this type. As has been lamented on many occasions, the courts have no interest in serving as "super-personnel departments."[11]

The approach advocated by petitioner herein clearly has some advantages. It is unquestionably appealing to consider the facts of each and every case to make sure that the right to be free of retaliation assured by the Civil Rights Act of 1964 is being fully protected. By contrast, the "bright-line" approach adopted by the Fifth Circuit clearly leaves open the possibility, however slight, that someone whom Congress meant to protect, will be left unprotected. This Court unquestionably has the power to decide which approach better serves the needs of those at

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[11] See, e.g., *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) (ADEA case); *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987); *Kephart v. Institute of Gas Tech.*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

risk of retaliation, including whether there are sufficient resources in the federal judiciary to engage in a case-by-case analysis of every claim of retaliation or whether a "bright-line" approach which offers everyone – courts, employers and employees alike – guidance will work better. The real issue, then, is whether this is a "problem" worthy of this Court's time. LSU respectfully submits that it is not.

CONCLUSION

For the foregoing reasons, LSU respectfully requests that this Honorable Court deny Manjit S. Kang's petition for writ of certiorari.

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